jurisdiction, in the sense of having an agent therein and doing business within the state, then it has been discriminated against. The proviso in the statute can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the state; it cannot be satisfied by a non-resident manufacturer, his factory necessarily being in another state, some of its products only at a given time being within the state. But if it is assumed the corporation was not within the state, the act was an attempt to regulate interstate commerce by levying a tax on imports, because a tax on an agent of a foreign corporation for the sale of a product is a tax on the product, and if the product be that of another state, it is a tax on commerce between states, and hence invalid. *Welton* v. *Missouri,* 91 U. S. 275; *Darnell & Son* v. *Memphis,* 208 U. S. 113. For other references see HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW, Chapter 6 *et seq.; International Paper Co.* v. *Massachusetts,* 246 U. S. 135; 16 MICH. L. REV. 264, 447; 9 MICH. L. REV. 549; BEALE FOREIGN CORPORATIONS, Chapter 5.

CONSTITUTIONAL LAW—EXCESS PROFITS TAX—INVESTED CAPITAL—Plaintiff claimed a refund of $1,081,184.61 paid as excess profits tax under title II of Revenue Act of 1917 (Ch. 63, 40 Stat. 300, 302 *et seq.*). The Act provides for deduction from income of a sum equal to a certain percentage of the invested capital and surplus for the taxable year, which shall be exempt from the tax. Plaintiff had bought, in 1904, certain lands for $190,000, which increased in value to about $10,000,000 by 1912. Plaintiff declared a stock dividend against this increase, by taking back the old stock, and giving twice as much new stock in return. In the tax return for 1917, the assessor refused to include the $10,000,000 increase as capital or surplus. On demurrer to the petition for refund, *held*: the demurrer should be sustained. *La Belle Iron Works* v. *United States,* (1921), 41 Sup. Ct. Rep. 528.

It was contended by the plaintiff that (1) the increase in value should be included as invested capital, or paid in or earned surplus; (2) should be considered as property paid in for stock under Sec. 207 (a) (2) of the Act; (3) that the construction based on cost alone was arbitrary, and violated due process of law. Most of the opinion is an interpretation of what Congress meant by "invested capital." It seems quite clear that Congress had in mind the cost basis, rather than present value. The court disposed of the second contention by saying that the exchange of stock was a purely internal transaction, referring to *Eisner* v. *Macomber,* 252 U. S. 189, which decided that stock dividends were not income as regards the income tax. The court showed that the purpose of Congress was to tax income in excess of a certain return on the capital actually embarked in the enterprise, and called the appreciation of value simply an unearned increment. This is not a new conception of capital. In *Bailey* v. *Clark,* 21 Wall 284, a case arising under a Revenue Capital tax, it was said that the term applied "only to the property or means contributed by the stockholders as a fund or basis for the business or enterprise for which the corporation was formed." And see statement in *In Re Simon,* 268 Fed. 1006 at p. 1008. For other examples of what is and

what is not "invested capital," see *Cartier* v. *Doyle,* 269 Fed. 647, holding that money put up by one of a partnership as security for loans to the partnership was invested capital for the excess profits tax; and *Tire Co.* v. *Iredell,* 268 Fed. 377, holding that patents, rented out to third parties on certain royalties, were not invested capital. It is difficult to see any possible argument against the constitutionality of the Act. The court held it not to be unreasonable of Congress to adopt the cost basis, thus resting values on experience rather than on vague anticipation of market values. It was argued that the tax would operate so unequally as to deny due process, and two cases under the Fourteenth Amendment were cited; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, and *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S. 55. The latter involved a paving tax based on frontage and area, the tax being held invalid because of gross inequality. It was pointed out that the Fifth Amendment has no equality clause, although it would seem that even under the Fifth Amendment, inequality, if sufficiently gross, would of itself show lack of due process. The paving tax case would be more analogous if the tax in the principal case were on capital, instead of on income. On the contrary, it is submitted that the tax burdens are borne less unequally with the cost basis, than if any valuation basis had been used. The principal case is valuable incidentally in helping to clear the legal-economic concept of value. Capital assets, converted into cash, were decided to be income for the income tax; *Merchants Loan and Trust Co.* v. *Smietanka,* (1921), 41 Sup. Ct. Rep. 386; 19 MICH. L. REV. 854. Unconverted capital assets, in the form of property, are neither capital nor income, but simply an unrealised, unearned increment.

CONSTITUTIONAL LAW—JUDICIAL REVIEW OF ORDER OF A COMMISSION—A water company in Pennsylvania appealed from an order of a commission, claiming the rate fixed by it to be confiscatory. A state statute authorized the reviewing court to ascertain whether such an order of a commission was "reasonable and in conformity with law." Under this statute the court reversed the order saying there had been an erroneous valuation of the company's property. On appeal to the state supreme court the latter held the reviewing court to be outside its jurisdiction in exercising its judgment as to the valuation of the property since there was competent evidence to support the finding of the commission. The United States Supreme Court *held,* that, under the construction given it by the state supreme court, the statute was unconstitutional in that it did not give the reviewing court the power to exercise its own judgment as to the facts and therefore denied due process. Brandeis, Holmes and Clark, JJ., dissenting. *Ohio Valley Water Company* v. *Ben Avon Borough, et al,* (June 1920), 253 U. S. 287, 64 L. Ed. 908.

Rate making, historically and in its very nature, is a legislative function delegated to commissions for reasons of expediency. It is well settled, however, that the order of such a commission must be reviewable in a court at the suit of an interested party who deems it unjust, otherwise due process is denied. *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210. But as to the extent of this review the principal case presents a difference of opinion. The dissenting opinion states that a review of questions of law, including whether